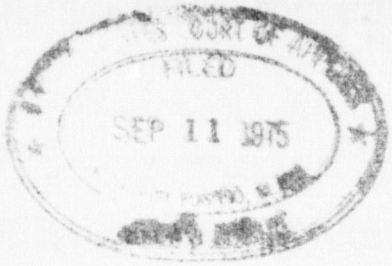
United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF



75-7290

United States Court of Appeals
FOR THE SECOND CIRCUIT

ACLI INTERNATIONAL, INC.,
Plaintiff-Appellant,

against

S.S. CAMPECHE, her engines, boilers, etc., TRANSPORTACION MARITIMA MEXICANA, S.A., dba MEXICAN LINE,
Defendants-Appellees,

TRANSPORTACION MARITIMA MEXICANA, S.A.,
Defendant and Third-Party Plaintiff-Appellee and Cross-Appellant,

against

PITTSTON STEVEDORING CORPORATION,
Third Party Defendant-Cross-Appellee.

73 Civ. 1297 HRT

(Caption continued on inside cover)

BRIEF OF DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLEE AND CROSS-APPELLANT

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ACLI INTERNATIONAL, INC.,

Plaintiff-Appellant,

against

TRANSPORTACION MARITIMA MEXICANA, S.A., dba MEXICAN LINE and SMITH AND JOHNSON (SHIPPING) INC.,

Defendants-Appellees,

TRANSPORTACION MARITIMA MEXICANA, S.A.,

Defendant and Third-Party Plaintiff-Appellee and Cross-Appellant,

against

PITTSTON STEVEDORING CORPORATION,

Third-Party Defendant-Cross-Appellee.

73 Civ. 5341 HRT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF OF DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLEE AND CROSS-APPELLANT

Statement

Plaintiff-appellant, consignee of shipments of cocoa butter from Coatzacoalcos, Mexico, brought two suits against Transportacion Maritima Mexicana, S.A., (hereinafter referred to as Mexican Line), in the United States District Court for the Southern District of New York to recover for loss of and/or damage to portions of such shipments carried aboard defendant-appellee's vessels. As Pittston Stevedoring Corp., had discharged the cargo in question on several of the subject voyages, it was impleaded into both actions as a third-party defendant.

Pursuant to stipulation of the parties and with the approval of the District Court, liability as to all claims was to be determined at a trial relating to a single voyage of the m/s Campeche in July, 1968.

Following trial on the merits, the Honorable Harold R. Tyler, Jr., in an opinion dated March 31, 1975, found that the damage to the subject shipment was the result of inherent vice of cargo, coupled with possible improper packaging, and dismissed the complaint. Mexican Line's third-party complaint against Pittston was also dismissed. Judgment, in accordance with Judge Tyler's opinion, was entered on April 23, 1975. Plaintiff's present appeal seeks to set aside the dismissal of its complaint and the entry of judgment in its favor. In support of its protective appeal, Mexican Line prays for judgment on its third-party complaint in the event this Court sees fit to disturb the findings and conclusions of Judge Tyler.

Issues Presented

Plaintiff's points on appeal, with a single exception, would have this Court set aside certain findings made by Judge Tyler as clearly erroneous. It is the position of Mexican Line, that as to all material findings there is ample supportive evidence in the record.

The additional ground for appeal asserted in appellant's brief, concerning burden of proof, is baseless.

The Facts

On July 13, 1968, the m/s Campeche called at the Port of Coatzacoalcos, Mexico, where she loaded 6,400 cartons of cocoa butter. Of these, 3,668 cartons were stowed in the after end of the vessel's #1 lower hold and the remaining 2,732 cartons were stowed in the #4 'tween deck. The entire shipment was carried under Bill of Lading No. 20, dated July 13, 1968.

The cocoa butter in question was manufactured at the plant of the shipper, Industralizadora de Cacao de Tabasco S/A, located at Cardenas, Mexico. In a semiliquid state, the cocoa butter was poured into polyethylene bags which, in turn, were placed in cardboard cartons. The cartons were then stored in the shipper's warehouse to await shipment to Coatzacoalcos. Each carton, when filled, weighed approximately 50 pounds (deposition of Jaime Rosique Priego, Vice President of Industrializadora, 282).* In the shipper's warehouse, the cartons were stacked no more than 8-10 high because, according to Mr. Rosique, if they were stacked any higher they would be "squash", and create pressure on the contents (282, 288). Nevertheless, the ship-

* Page references are to the joint appendix.

per's cartons were imprinted with the materially misleading instruction that they could be stacked up to 30 high (284). The same carton, a sample of which was marked in evidence (plaintiff's Exhibit 16), was used by the shipper for local shipments as well as for export (283).

Upon notification that the Campeche was due at Coatzacoalcos, the shipper arranged for unrefrigerated trucks to transport the cartons of cocoa butter to the port. Documents submitted by plaintiff purport to show that the trucks which delivered the shipment in question began arriving at Coatzacoalcos on July 10, 1968, with the last such delivery on July 12, 1968 (24-72 hours prior to loading). Despite the shipper's testimony that the cocoa butter was customarily trucked no more than 36 hours prior to a vessel's arrival (276), it is interesting to note that provision was made for re-cartonizing on the pier if the cartons remained there more than 8 days (293).

The storage facilities at Coatzacoalcos are owned by the Mexican Government (244, 297), and the interior of these facilities is not temperature-controlled (290). Both Mr. Rosique on behalf of the shipper and Mr. Jose Ruiz on behalf of the vessel owner's agent at Coatzacoalcos agreed that the temperature in the government warehouse reaches 40° Centigrade, or 104° Fahrenheit, in the Summer (244; 290, 297). There was convincing expert testimony that the government warehouse does not provide suitable storage for cocoa butter (133) and Mr. Rosique, himself, agreed that the facilities are not adequate (279).

The shipper paid all storage charges at Coatzacoalcos, and the vessel did not assume custody until the cargo was alongside (233, 260-261, 338).

The subject cartons of cocoa butter remained in the government storage facilities at Coatzacoalcos for an aver-

age of two or more days, at temperatures in excess of the melting point of the commodity, found by Judge Tyler to be in the range from 30° to 36.3° Centigrade, before being loaded aboard the m/s Campeche on July 13, 1968. Thus, melting took place prior to loading but, because of the polyethylene bags and the fact that the cartons were only stacked 8 high in the warehouse (258), this condition was not discernible at the time of loading (154, 328).

At the loading port, the cartons were placed by hand into nets, brought aboard the vessel and stowed in the compartments previously mentioned. Because of the relevative heights of the two cargo compartments and the number of cartons in each, those in #1 lower hold were necessarily stowed higher than those in #4 'tween deck, in excess of 12 high as estimated by plaintiff's trial counsel (167), and probably closer to 16 (compare testimony of Chief Officer Villegas Dominguez, 153-154, and the vessel's capacity plan, defendant's Exhibit T). The general configuration of the stow, as seen on the cargo stowage plan (Defendant's Exhibit O), shows the height of the cocoa butter in #1 lower hold to be substantially greater than that in #4 'tween deck.

During the northbound voyage of the Campeche, ventilation was introduced into the vessel's cargo hatches in accordance with the prevailing custom (158) and the average temperature during the period was 75°F. (173).

After a brief stop at Philadelphia, the vessel continued on to New York, arriving at Pier 20, Staten Island, on July 23, 1968. When the discharge of cocoa butter from #1 lower hold was begun, the top tiers were intact but, as the work progressed, the lower tiers were noted to be damaged. This damage was most prevalent in lowest portion of the stow (159, 161-162). Cartons were crushed; melted cocoa butter had seeped out of the polyethylene bags, staining

its own and adjacent cartons. Further, the melted cocoa butter had seeped down around drums stowed at the bottom of the lower hold. Most significantly, however, the cocoa butter which had seeped around the drums had hardened again (160-161).

The absence of any damage to the portion of the shipment in #4 'tween deck and the fact that the cocoa butter which had seeped around the drums in the #1 lower hold had re-hardened, led Judge Tyler to conclude that the melting did not take place while the cargo was in stow but occurred prior thereto.

At the trial, appellee called as a witness, Sr. Emilio Espana Krauss. He is the owner and manager of Industrial Soconusco of Mexico City, another manufacturer and shipper of cocoa butter from Mexico to the United States aboard Mexican Line vessels. Sr. Espana has spent over 25 years in his business and is thoroughly familiar with every phase of the processing, packaging and shipping of cocoa butter (105-108). He gave a detailed description of the proper method of manufacturing this product for export shipment (108-117). At Sr. Espana's plant, a special carton is used for export purposes having reinforced corners, an extra, interior cardboard wall, overlapping flaps to strengthen the bottom surface and metal straps to bind the outside of the carton (117-122; defendant's Exhibits I, J, K, L). Comparing his own carton with a sample of the carton used in the subject shipment (plaintiff's Exhibit 16), Sr. Espana expressed the opinion that, based upon his many years of experience in the business, the latter was not adequate for export (129). His reasons therefore are fully set forth in the record (125-130).

Appellant claims to have experienced losses since it began importing cocoa butter from Industrializadora de Cacao de Tabasco S/A, with damage ranging from 25% to

75% per shipment. On the suspicion that melting "had a good head start at the port of loading", appellant engaged the services of a private investigative agency to ascertain whether the cocoa butter was stored "in excessively hot shed areas" at Coatzacoalcos (Defendant's Exhibit F). By way of contrast, Mr. Kenneth H. McClure, consignee of Sr. Espana, has received shipments of cocoa butter from the latter for over 20 years, all arriving in good order and condition at New York (136-139; Defendant's Exhibit M).

On the basis of all the testimony and the exhibits introduced at the trial, Judge Tyler found that the damaged portions of the shipment in question had not been in good order and condition when loaded at Coatzacoalcos, the result of inherent vice of cargo. He further acknowledged that insufficient packaging may have been a contributing factor to the damage (see footnote 1 of Judge Tyler's opinion).

It is appellee's position that the findings and conclusions of Judge Tyler are not only supported by substantial, credible evidence but are virtually compelled thereby. As noted, the damage in question was confined to the lower tiers of cartons in the #1 lower hold of the m/s Campeche. This portion of the stow was subjected to the greatest pressure, due to the weight of the cartons above and the movement of the vessel while at sea. As the cocoa butter was no longer in a solid state at the time of loading, it could lend no strength to the cartons in which it was packaged. Accordingly, the lower cartons could not withstand the pressure from above and collapsed. With the full weight then on the polyethylene bags in the lower portion of the stow, they, too, burst and the already melted cocoa butter leaked out. Because of the cooler temperatures prevailing in the hold, this melted cocoa butter later rehardened in and around the drums below.

There was more than sufficient evidence to show that the melting of the cargo prior to loading, 46 U. S. C. §1304 (2) (m), *J. Howard Smith, Inc.* v. *S.S. Maranon,* 501 F.2d 1275 (2 Cir., 1974), cert. den. 95 S.Ct. 1399, coupled with insufficient packaging was the cause of damage to the subject shipment, 46 U.S.C. §1304 (2)(n); *LaFortune* v. *S. S. Irish Larch,* 503 F.2d 952 (2 Cir., 1974). As noted in Modern Export Packing, published by the U. S. Department of Commerce, p.93, and as to which plaintiff's expert witness, (90), readily agreed:

> "Resistance to compression, for example, is a relatively minor factor where the contents are of such a nature as to support the walls of the container, or the interior packaging is so designed as to furnish necessary support. Where these factors are not present, the shipper must be certain that the container being used has sufficient resistance to compression to prevent it from caving in when it is placed in the bottom tier of a pile of boxes in a warehouse, pier, or steamship hold * * * ".

This, the shipper obviously failed to do.

POINT I

There was substantial credible evidence to support the essential findings of fact made by the District Court.

In the foregoing presentation of the facts, appellee has indicated, generally, where in the record they are supported. In this Point, reference will be made only to those findings of fact specifically challenged by appellant as unsupported.

A. Appellant initially contends in its "Statement of Issues Presented for Review", that Judge Tyler had before him no evidence to support the finding that the truck

carriage of cargo from the premises of the shipper to the Port of loading took four as opposed to two hours and that the carriage took place during daylight hours.

At the very outset, it should be noted that Judge Tyler chose to infer that "*some* of the trips took place after the sun had arisen". This is a far cry from the suggestion that *all* such shipments took place during daylight hours. Nevertheless, while acknowledging that there was contrary testimony, Judge Tyler was fully justified in inferring as he did since Sr. Espana Krauss testified as follows in response to inquiries by appellant's counsel (134):

> "Q. Mr. Espana, you said that you were familiar with the route from Cardenas to Coatzacoalcos?
>
> A. Yes.
>
> Q. Do you know how long that takes by truck?
>
> A. I was making this by driving. I think that it is about three, four hours driving a car. Could be six in a truck."

Further, the vessel owner's agent in Coatzacoalcos testifying by deposition, had the following to say (262):

> "Q. At that time did Tomas Ruiz, S. A. has anything to do when the trucks were sent out from Cardenas
>
> A. No
>
> Q. At the time did you occasionally saw the trucks arriving from Cardenas
>
> A. Yes
>
> Q. At what time of the day they arrived?
>
> A. Any time."

Even if such testimony were not present, appellant has failed to show how the particular finding in question was material and prejudicial. Indeed, the uncontradicted testimony of Sr. Espana Krauss would indicate to the contrary. As he stated (114):

> "Q. Incidentally, are you familiar with the road route from Cardenas to the Port of Coatzacoalcos?
>
> A. Yes, I know it.
>
> Q. Would you say that that is a cooler route or a warmer route than the route that your trucks take?
>
> A. No, it's a very warmer route because it is at sea level. It's hot all the day, in the night and the day."

Finally, appellant has failed to point out where, in his opinion, Judge Tyler found that any melting of the cargo took place during the truck shipment from Cardenas to the coast.

B. Appellant next takes issue with the finding that "a good portion of the cargo from July 11, to July 13, was tiered up quite high under the sheds, either in a position where there was little circulation of air or where some of the cartons were very close to the metal roof under the blazing sun, or both".

In presenting its issue, appellant appears to submerge the fact that the finding was posed in the alternative. Appellant also overlooks the following testimony of Sr. Espana (133):

> "Q. Mr. Espana, are you familiar with the government's storage facilities at the pier at Coatzacoalcos?
>
> A. Yes, I know it. I was in there several times.
>
> Q. In your opinion, sir, and based on your experience, are these adequate storage facilities for the storage of cocoa butter for up to two days?

A. No. I will never accept to put our cocoa butter in this storage because it melted. It's very hot. The ceiling is from sheets of metal and it absorbs too much heat . . ."

The shipper conceded that the temperature in the government warehouse reaches 40° Centigrade (104°F) in the summer (290, 297) and agreed with appellee's expert that this facility is not adequate for the storage of cocoa butter (279, 133). In view of the shipper's further concession that the interior of the warehouse is not temperature-controlled (290), can it be seriously contended that there was substantial circulation of air in and about the shipment in question?

A re-reading of the record fails to disclose any indication of the height of the storage facility at Coatzacoalcos and appellant makes no record citation in support of its indignant conclusion (p. 8 of appellant's brief) that the ceiling was some 50 feet above the floor.

C. Appellant next attacks the finding that there was no evidence of special instructions given to the vessel regarding handling and storage except for "a legend on the packaging." In an attempt to refute the finding, appellant cites the testimony of the vessel's agent to the effect that an instruction was, in fact, received from the shipper not to load "to high in a close space." While admitting that the agent's testimony is somewhat cryptic, appellant neglects to demonstrate how such a vague communication could alter or modify the clear, written instructions appearing on the shipper's own package indicating that the cartons could be stacked to a maximum of 30 high (284, 154). Considering the testimony of the vessel's agent that the dimensions of the Campeche would not permit stowage of cartons of cocoa butter more than 20 high (262), one can

readily see why appellant stops short of attempting to show how the "cryptic" special instruction for handling was violated.

D. Appellant's final salvo is directed towards the finding of Judge Tyler that the melting point of cocoa butter is 30° to 36.3° Centigrade (86°-97.3° F.).

In support of Judge Tyler's finding, appellee respectfully calls the Court's attention to the testimony of Sr. Espana, a man of 25 years experience in all phases of the manufacture, packaging and shipment of cocoa butter (132-133):

> "Q. Mr. Espana, what is the melting point of cocoa butter?
>
> A. It depends, it depends on the source of the cocoa butter. It's between thirty and thirty-three degrees, Centigrade degrees.
>
> The Court: Is that Fahrenheit or Centigrade?
>
> The Witness: No, Centigrade.
>
> The Court: Thirty—
>
> The Witness: —to thirty-three.
>
> The Court: Thirty to thirty-three.
>
> The Witness: But in some cases if the cocoa butter is obtained from beans who was cut without wait the complete development of the beans in the plant, the point of melting could be lower. Twenty-seven Centigrade degrees."

From all of the foregoing, appellee respectfully submits that the essential findings of Judge Tyler find full and complete support in the record and, most certainly, are not clearly erroneous.

POINT II

The District Court did not err in concluding that appellant had failed to sustain its burden of proof.

In the foregoing portions of this brief, appellee has sought to demonstrate the soundness of Judge Tylers' findings that the damage to the shipment of cocoa butter was due to inherent vice; that the melting of the cargo took place prior to loading but was not discernible at that time, resulting in the eventual collapse of the lower tiers of the stow because of insufficient packaging. Appellant submits that if Judge Tyler's findings be sustained, the conclusion inevitably follows that the cargo was not delivered to the vessel in *actual* good order and condition. *Commodity Service Corporation* v. *Hamburg-American Line*, 354 F. 2d 234 (2 Cir., 1965); *Elia Salzman Tobacco Co.* v. *S/S Mormacwind*, 371 F. 2d 537 (2 Cir., 1967).

Point II of appellant's brief, charging that the District Court erred as a matter of law, appears to confuse the initial burden of presenting evidence which, if credited, make out a *prima facie* case, with the burden of ultimate persuasion. As to the former, appellant overlooks the fact that Judge Tyler, at the conclusion of plaintiff's direct case, denied appellee's motion to dismiss but indicated, even at that time, certain reservations concerning the actual condition of the cargo when loaded (99-100).

Certainly, appellant must agree that liability need not always follow simply because the plaintiff's initial presentation survives a motion to dismiss. This merely signifies the shifting of the burden of proof as discussed by this Court in *Tupman Thurlow Co. Inc.* v. *S/S Cap Castillo*, 490 F. 2d 302 (2 Cir., 1974) where it was stated at 303:

> "Under the Carriage of Goods By Seas Act (COGSA), 46 U.S.C. §1300 et seq., the plaintiff has the burden of establishing that the cargo in question was delivered in good condition to the carrier and that it was damaged on discharge. If the plaintiff satisfies this burden, the burden of proof then shifts to the defendant to establish that the damage resulted from one of the statutory exceptions in §1304(2)."

In reviewing the lower court's determinations as to which burdens were met, this Court then acknowledged, 490 F. 2d at 304:

> "The fixed point by which we must steer on appeal is the clearly erroneous rule. McAllister v. United States, 348 U.S. 19, 20-21, 75 S.Ct. 6, 99 L.Ed. 20 (1954)."

Appellant's apparent indignation over Judge Tyler's conclusion that it had "failed to prove that the damage was due to either improper stowage or any other negligent custody and control of the cargo by the Mexican Line and its agents" (Point III of appellant's brief), is the result of still another misunderstanding of the constant shifting of burden of proof. This shifting was clearly set forth in *J. Gerber & Company* v. *S.S. Sabine Howaldt*, 437 F. 2d 580 (2 Cir., 1971), where the Court stated at 588:

> "While in general the rule is that the carrier, to be exonerated, must prove that it comes within one of the exceptions 2(a-p) of § 1304, once it has done so, the burden rests upon the shipper to show that there were, at least, concurrent causes of loss in the fault and negligence of the carrier, unless it is one of the kinds of negligence specifically excluded, e.g. 2(a). If the shipper does so, then the carrier has the practically insuperable burden of proving the portion of the loss

> caused by the particular exception invoked and the portion caused by its negligence. If the carrier fails to do so, it loses all exoneration and must bear full liability for the loss."

See, generally, Gilmore & Black, The Law of Admiralty (2nd Ed. 1975) at p. 141 dealing with this ever-shifting burden of proof.

That Judge Tyler recognized and applied the principles set forth in *J. Gerber & Company* v. *S.S. Sabine Howaldt, supra,* is evident from the very conclusion which appellant finds offensive. Appellant's further opportunity to establish liability for negligence in the face of evidence in support of statutory defenses was acknowledged as was appellant's failure of proof in this regard.

In his opinion, Judge Tyler notes that "the issues of liability are close", that there was "conflicting evidence" and that "the matter is not free from doubt." Under such circumstances he was not bound to accept or reject any particular testimony and was free to draw all reasonable inferences from the evidence presented. Appellee respectfully submits that his findings and conclusions should not be disturbed.

CONCLUSION

The judgment of the District Court should be, in all respects, affirmed.

Respectfully submitted,

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